IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

PYOTT-BOONE ELECTRONICS INC., ETC.,	)	
Plaintiff,	)	Case No. 1:12CV00048
v.	)	**OPINION AND ORDER**
IRR TRUST FOR DONALD L. FETTEROLF DATED DECEMBER 9, 1997, ET AL.,	)	By: James P. Jones United States District Judge
Defendants.	)	

Eric D. Brandfonbrenner and Jose Lopez, Perkins Coie LLP, Chicago, Illinois, and Paul W. Jacobs, II, Warren David Harless, Roman Lifson, and Nichole Buck Vanderslice, Christian & Barton, LLP, Richmond, Virginia, for Plaintiff; Thomas M. Wolf and John "Jack" M. Robb, III, LeClairRyan, a Professional Corporation, Richmond, Virginia, and Brian H. Simmons, Jordan M. Webster, and Kate R. Paine, Buchanan Ingersole & Rooney PC, Pittsburgh, Pennsylvania, for Defendants.

In this diversity case involving a business transaction, I previously granted the defendants' Motion to Dismiss the Complaint for failure to state a claim. *Pyott-Boone Electronics Inc. v. IRR Trust for Donald L. Fetterolf Dated Dec. 9,* 1997, No. 1:12CV00048, 2013 WL 160117 (W.D. Va. Jan. 15, 2013). In response, the plaintiff has filed a Motion for Leave to File its First Amended Complaint. In addition, the plaintiff has moved the court to certify its prior ruling to permit an interlocutory appeal of the prior dismissal order. The defendants have responded

in opposition to both of these motions. For the reasons that follow, I will grant the plaintiff leave to amend, but the plaintiff's request for leave to file an immediate appeal will be denied.

I

The plaintiff, Pyott-Boone Electronics Inc. ("PBE"), is a Virginia corporation that manufactures safety and communication equipment for mines. On April 1, 2011, PBE was acquired by and then merged with PBE Acquisition, Inc. ("PBE Acquisition"), with PBE emerging as the surviving entity. The claims the plaintiff now seeks to assert in its proposed First Amended Complaint arise from this transaction. PBE Acquisition purchased all of PBE's outstanding capital stock by entering into a Stock Purchase Agreement ("SPA") with defendants the IRR Trust for Donald L. Fetterolf Dated December 9, 1997, (the "Donald Fetterolf Trust") and the IRR Trust for M. Mitchell Fetterolf Dated December 9, 1997 (the "Mitchell Fetterolf Trust"), which were PBE's majority stockholders. At the time of the transaction, defendant Fetterolf Group, Inc., served as representative for the stockholders of PBE. Defendants Donald and Mitchell Fetterolf served as officers of PBE, as well as trustees of their namesake trusts. Defendant Brian Fetterolf managed the day-to-day affairs of PBE.

The plaintiff originally filed this action in state court and the defendants removed it to this court pursuant to 28 U.S.C.A. § 1441(a) (West Supp. 2012), invoking this court's jurisdiction under 28 U.S.C.A. § 1332(a) (West 2006). The original, eight-count Complaint asserted claims against the defendants under the Virginia Securities Act, for breach of contract, for declaratory relief, for breach of the implied covenant of good faith, and for common law fraud. After briefing and argument, I granted the defendants' motion to dismiss, finding that the SPA's choice of law provision selecting Delaware law precluded application of the Virginia Securities Act. I further found that the plaintiff's claims for breach of the implied covenant of good faith and for fraud based on extra-contractual misrepresentations were barred under Delaware law by the SPA's merger, integration and anti-reliance provisions. Finally, I found that the plaintiff had not alleged sufficient facts to state a plausible claim for breach of contract and for that reason the plaintiff was not entitled to declaratory relief.

The plaintiff has now moved pursuant to Federal Rule of Civil Procedure 15(a)(2) for leave to amend the original Complaint. PBE's proposed First Amended Complaint contains six counts: breach of contract (Count One), violations of the Delaware Securities Act (Counts Two, Three and Four), common law fraud based on intentional contractual false statements (Count Five), and indemnification (Count Six). The defendant has responded in opposition, arguing

that the proposed First Amended Complaint exceeds the scope of the leave to amend the court already granted, that all of the proposed claims would be futile, and that leave to amend should be denied under the "law of the case" doctrine. The motion has been fully briefed and is ripe for determination.

A party may seek leave to amend a complaint, and the court should "freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "This directive gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities." *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 193 (4th Cir. 2009) (internal quotation marks and citation omitted). "This means that a request to amend should only be denied if one of three facts is present: 'the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or amendment would be futile.'" *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 379 (4th Cir. 2012) (quoting *Matrix Capital*, 576 F.3d at 193).

As an initial procedural issue, the defendants first argue that Counts Two through Six should be stricken from the proposed First Amended Complaint because they exceed the permissive scope of the leave to amend that the court had previously granted. In my opinion dismissing the original Complaint, I noted that upon the plaintiff's filing of a timely motion, "leave will be granted to amend as to the claim . . . alleging a breach of section 3.02(r)(i) of the SPA." 2013 WL

160117, at *15. The plaintiff has amended its claim for breach of contract based on this provision of the SPA in Count One of the proposed First Amended Complaint. The defendants contend that any other amendment to or addition of a claim is necessarily outside of the scope of the leave to amend and therefore must be dismissed.

The plaintiff, however, correctly points out that at the time the court noted that leave to amend would be granted with respect to this specific count, no motion for leave to amend the complaint was before the court. It cannot be said, therefore, that the court has already determined the scope of amended claims that the plaintiff might assert; rather, the court merely noted one potential amendment that the plaintiff might seek. Moreover, the cases on which the defendants rely illustrate how this case is distinguishable from one in which the court has already expressly limited the scope of amendment. For example, in *Kuntz v. New York State Board of Elections*, the court granted the defendants' motion to strike the amended complaint because it exceeded the court's "careful" and express grant of leave to amend. 924 F. Supp. 364, 366 (N.D.N.Y. 1996). In *Kuntz*, the plaintiff had already moved to amend, prompting the court to place specific limitations on the scope of amendment as a result of the "borderline frivolousness and facial inadequacy of [the plaintiff's] earlier Complaint, coupled with his propensity to file numerous and voluminous, but often immaterial and ultimately meritless,

exhibits, affidavits and responses to defendants' motions." *Id.* In contrast, the motion currently before the court is the first opportunity to address a motion for leave to amend in this case. Furthermore, the court's prior statement regarding PBE's ability to amend its claim under section 3.02(r)(i) of the SPA was not motivated by the same concerns underlying the court's express and very clear limitations on the plaintiff's amendment in *Kuntz*. Therefore, Counts Two through Six of the proposed First Amended Complaint should not be precluded on this ground.

II

The defendants' substantive argument is that leave to amend should not be granted because PBE has failed to allege sufficient facts to state a claim for relief under any of the six counts in the proposed First Amended Complaint, rendering dismissal inevitable and any amendment futile. A viable complaint must state "a plausible claim for relief" that permits "the court to infer more than the mere possibility" of liability. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). On the other hand, the issue at this stage is not whether the plaintiff will prevail, but "whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

A

The defendants first contend that Count One of the proposed First Amended Complaint, which alleges a claim for breach of contract under section 3.02(r)(i)[1] of the SPA, fails to state a claim. In my prior opinion, I determined that in order to state a claim under this section, the plaintiff must plead facts that would tend to show "that at the time of the sale (1) a material change had occurred in PBE's business relationship with at least one of its 'Material Customers,' and (2) PBE had notice of this material change or 'Material Adverse Effect.'" 2013 WL 160117, at *5 (footnotes omitted).

The plaintiff has satisfied this standard in its proposed First Amended Complaint. PBE alleges that it has yet to install any Leaky Feeder and Tracking System ("LFTS") equipment since the sale. (Proposed First Am. Compl. ¶ 70.)

[1] This section provides:

> Except as set forth in Schedule 3.02(r)(i) and changes in product and purchasing requests and levels in the ordinary course of business that are consistent with the Company's projections for 2011, there has not been any material change in the Company's business relationship with any of the Material Customers and the Company has not received notice from any Material Customer that said customer intends to terminate its business relationship with the Company, materially reduce, increase, delay, or accelerate any purchases from the Company, materially and adversely change the terms upon which it purchases goods or services from the Company (other than changes in terms and conditions in the ordinary course of business), modify the volume of purchases from the Company in 2011 by more than $100,000 as compared to 2010 levels, or otherwise reflecting a Material Adverse Effect on the business relationship between any such Material Customer and the Company.

The plaintiff alleges that prior to the 2011 acquisition of the company, sales of LFTS equipment accounted for more than fifty percent of PBE's mining revenue in 2009 and more than sixty percent for the first portion of 2010. (*Id.* at ¶ 23.) It is further alleged that prior to the acquisition the defendants conducted a survey of four major distributors of PBE's LFTS equipment. (*Id.* at ¶ 28.) Each of those distributors satisfied the SPA's definition of Material Customer.[2] The survey showed that while a number of the customers' mines had yet to install LFTS equipment, "almost all had *already* purchased the equipment from PBE's competitors." (*Id.* at ¶ 44.)

The plaintiff has thus alleged sufficient facts to plausibly show that the defendants were aware at the time of the sale that four Material Customers intended to materially reduce their purchases from PBE. Count One of the proposed First Amended Complaint is, therefore, not futile on its face.

For the same reason, Count Six of the proposed First Amended Complaint is not futile. Count Six seeks a declaratory judgment that the plaintiff is entitled to indemnification pursuant to section 10.02(b) of the SPA.[3] This section of the SPA

[2] Section 3.02(r)(i) defines "Material Customers" to be "the ten (10) largest customers of the Company . . . based on the gross revenues of the Company for the fiscal year ended on December 31, 2010 for each such Material Customer during such period."

[3] This section of the SPA provides as follows:

provides indemnification to the buyer of the company for any proven breaches of the express representations and warranties contained in section 3.02 of the SPA. Because the plaintiff has alleged sufficient facts to state a claim for breach of the express warranties of section 3.02(r)(i), the claim for indemnification of damages caused by that alleged breach is also not futile on its face.

B

The defendants further contend that the plaintiff's attempt to state claims under the Delaware Securities Act in Counts Two, Three and Four of the proposed First Amended Complaint would also be futile and should therefore be denied. The defendants believe that PBE is attempting to assert these statutory fraud claims on the basis of misrepresentations contained in the Distributor Analysis, which was

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> [E]ach Stockholder, jointly and severally with respect to claims to be satisfied from the Stockholder Escrow Amount, the Working Capital Escrow Amount and/or the Tax Escrow Amount, and individually and severally, solely with respect to such Stockholder with respect to all other claims, shall indemnify, defend and hold each of the Buyer Indemnified Parties and, following the Closing, the Company, harmless from and against any and all:
>
> (i) Losses resulting from breaches of representations and warranties made by or on behalf of the Stockholders in Section 3.02 in this Agreement or in any document delivered hereunder;
>
> (ii) Losses resulting or arising out of any and all breaches of covenants, agreements and/or certifications made by or on behalf of the Stockholders in this Agreement or other Transaction Documents;
>
> (iii) Losses based upon, arising out of or caused by any fraud or willful misconduct of any of the Stockholders.

not among the documents and representations expressly incorporated into the SPA. The defendants argue that the plaintiff will not be able to show that it justifiably relied on the statements provided to it in the Distributor Analysis because it disclaimed reliance on any representations not expressly contained within the agreement.

The defendants appear to misinterpret the plaintiff's claims in Counts Two, Three and Four. The plaintiff alleges in Count Two that the defendants "made false and misleading statements including in the SPA and elsewhere." (*Id.* at ¶ 98.) Count Three alleges that "the Defendants, individually and through their agents, furnished Plaintiff with representations, including in the SPA and elsewhere, which contained knowing and intentional material misrepresentations." (*Id.* at ¶ 104.) Count Four generally alleges that the defendants made fraudulent misrepresentations such that Donald, Mitchell and Brian Fetterolf should incur control person liability. By their terms, none of these claims rely on the Distributor Analysis as the sole source of the alleged fraud. Indeed, Counts Two and Three — the allegations of which are also incorporated into Count Four — specifically allege that misrepresentations were contained within the SPA itself. Contrary to the defendants' assertions, therefore, the plaintiff is not attempting to rely soley on extra-contractual representations and its claims under the Delaware Securities Act are not facially futile on this ground.

Moreover, the court's prior decision dismissing the plaintiff's claims in the original Complaint was based upon the SPA's choice of law provision selecting Delaware law as the governing law of the agreement. 2013 WL 160117, at *11-13. I made no other decision with regard to the plaintiff's ability to state claims for statutory fraud that Counts Two, Three and Four of the plaintiff's proposed First Amended Complaint would contravene.

C

Finally, the defendants submit that the plaintiff's claim for fraud in the inducement, which is contained in Count Five of the proposed First Amended Complaint, would also be futile. Count Five alleges that the defendants knowingly and intentionally made untrue statements of material fact and omitted to state material facts necessary to make other statements made to the plaintiff not misleading. The plaintiff claims that these knowing misrepresentations induced it to enter into the SPA and to pay an inflated price for the stock. PBE asserts that it justifiably relied on the defendants' misrepresentations given their expertise in the business and the defendants' insistence on the plaintiff's agreement not to conduct its own due diligence.

The claim the plaintiff seeks leave to assert in Count Five of the proposed First Amended Complaint is essentially the same claim for common law fraud as was presented in Counts Seven and Eight of the original Complaint. In my prior

decision granting the defendants' motion to dismiss, I concluded that the merger, integration and anti-reliance language of the SPA barred any claims for fraud based on the plaintiff's reliance on statements that were not expressly incorporated into the SPA. *Id*. at *13-14. The reasoning that motivated my prior holding remains true and renders the plaintiff's attempt to add this claim to its amended complaint futile.

The plaintiff appears to assert two rationales in support of its motion for leave to amend with regard to this count. First, paragraph 121 of the proposed First Amended Complaint asserts that the provisions of the SPA that might otherwise insulate the defendants from liability are unenforceable. The plaintiff alleges that parties may not shield themselves from liability for fraud by inserting a protective clause into the very agreement that was procured by fraud. In support of this assertion, the plaintiff cites the Delaware Chancery Court's decision in *ABRY Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1061 (Del. Ch. 2006).

Rather than justifying its position, however, the court's holding in *ABRY Partners* vitiates the plaintiff's argument. The court noted that courts in Delaware have a "distaste for immunizing fraud," but went on to confine that approach to "decisions primarily involv[ing] the protection of a relatively unsophisticated party or a party lacking bargaining clout who signs a contract with a boilerplate merger clause." *Id.* In contrast, the court expressed its "respect [for] the ability of

sophisticated businesses . . . to make their own judgments about the risk they should bear and the due diligence they undertake, recognizing that such parties are able to price factors such as limits on liability." *Id.* The court made clear that courts in Delaware would enforce clauses, such as an anti-reliance clause, that limit a party's liability for fraud, especially where the parties are sophisticated business entities, as they were in *ABRY Partners* and as they are here.

The plaintiff has also argued that its proposed claim for fraud in Count Five is consistent with the court's prior decision. The plaintiff asserts that the fraudulent misrepresentation at the foundation of this claim is section 3.02(r)(i) itself. PBE claims that the defendants intended for it to rely on what they knew to be a false warranty. Contrary to the plaintiff's assertions, however, the claim presented in Count Five does not specifically allege that the SPA itself contained a misrepresentation. The language of Count Five is hardly distinguishable from the language of Count Seven of the original Complaint, which this court dismissed.

Moreover, although the plaintiff has alleged facts that would tend to show that defendants were aware that four material customers intended to reduce their purchases from PBE at the time the parties entered the agreement, that allegation does not prove that the plaintiff's consent to the inclusion of that warranty was procured by fraud. Rather, those facts, if proven true, would simply show that the defendants committed a breach of contract.

For these reasons, plaintiff's request for leave to amend by asserting Count Five of the proposed First Amended Complaint would be futile and must be denied.

III

The defendants finally argue that leave to amend should be denied because PBE's proposed statutory and common law fraud claims violate the law of the case doctrine. Having already concluded that the plaintiff's common law fraud claim should be struck from the amended complaint, I will only address this argument with regard to the claims for statutory fraud.

"The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. U.S. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950). This doctrine, however, is not applicable in the context of the plaintiff's claims for statutory fraud. My prior decision dismissing the claims under the Virginia Securities Act in the original Complaint was premised entirely on the SPA's choice of law provision. I found that Delaware law, including its securities laws, should govern. I made no other decision about the merits of the plaintiff's claims for statutory fraud. Given that PBE has now asserted claims under

Delaware law, there are no prior rulings in this case that would counsel striking these claims under the law of the case doctrine.

IV

The plaintiff has also filed a Motion for Certification and Leave to Appeal the court's decision dismissing the original Complaint.

PBE first petitions for leave to appeal pursuant to Federal Rule of Civil Procedure 54(b), which gives the court discretion to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." The Fourth Circuit requires a district court to follow two steps to effectuate a Rule 54(b) certification. '"First, the district court must determine whether the judgment is final.'" *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 855 (4th Cir. 2010) (quoting *Braswell Shipyards, Inc. v. Beazer E., Inc.*, 2 F.3d 1331, 1335 (4th Cir. 1993)). "A judgment must be final in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action." *MCI,* 610 F.3d at 855 (internal quotation marks and citations omitted). The district court must then '"determine whether there is no just reason for the delay in the entry of judgment.'" *MCI*, 610 F.3d at 855 (quoting *Braswell*, 2 F.3d at 1335). Among the

factors the court should consider in determining whether there is just reason for delay are:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Braswell, 2 F.3d at 1335-36 (internal quotation marks and citation omitted).

In this case, the plaintiff's motion for leave to appeal does not satisfy these requirements. Assuming, as the parties do, that the court's dismissal of the original Complaint was a final judgment with regard to those claims, there remain a number of just reasons to delay an appeal. First, the adjudicated claims dismissed from the original Complaint and the remaining unadjudicated claims from the proposed First Amended Complaint are substantially similar and therefore are fundamentally related. Entering a final judgment and allowing the plaintiff to immediately appeal the court's prior ruling may ultimately require the court of appeals to review the transaction and contract underlying this case more than once. "[T]he fact the parties on appeal remain contestants below militates against the use of Rule 54(b)." *Braswell*, 2 F.3d at 1336; *see also Sensormatic Sec. Corp. v. Sensormatic Elecs. Corp.*, No. Civ.A. DKC 2002-1565, 2004 WL 86179, at *5 (D.

Md. Jan. 20, 2004) (holding that "[g]ranting certification would therefore require the appellate court to review the [agreement] and the parties' business relationship on two separate occasions. This is certainly not in the best interests of efficient judicial administration."). Moreover, the plaintiff cannot argue that an immediate appeal of the court's prior decision would streamline the resolution of the claims that remain. *See Fox v. Balt. City Police Dep't*, 201 F.3d 526, 532 (4th Cir. 2000) (approving of the entry of final judgment on a claim, allowing immediate appeal, where "it will streamline the resolution of the remaining plaintiffs' claims."). Five claims remain before the court, none of which would likely be resolved by a decision from the court of appeals while the case is at its current procedural posture.

Given that the court has granted the plaintiff leave to amend its complaint, allowing an immediate appeal of the prior claims as well will only increase the economic and temporal burden of litigation on both the parties and the courts. I therefore decline to enter a final judgment on the plaintiff's prior claims under Rule 54(b).

The plaintiff also seeks certification for an interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b) (West 2006). This provision allows a district court in a civil action to certify an order for immediate appeal where "such order involves a controlling question of law as to which there is substantial ground for difference of

opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* It is generally understood that § 1292(b) "should be used sparingly." *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989).

In this case, there is no single issue before the court that could be resolved on appeal that is controlling on many of the issues of the case that would materially advance the litigation. The court's prior decision addressed issues regarding the applicable law, contract interpretation and the content of Delaware law. The resolution of these issues would not terminate the case or even any of the individual claims presented in the original Complaint or that remain before me now. These issues stand in contrast to the situations presented in the cases in which the Fourth Circuit has generally approved of certification of an immediate appeal. *See Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 195 (4th Cir. 2011) (approving certification where the court was presented with a pure question of law — the interpretation of a statute — the "resolution of [which] terminates the case.").

Allowing the plaintiff to immediately appeal any or all of these issues would not substantially advance the court's determination of the claims that remain before it. For that reason, certification of an immediate appeal is not appropriate in this case. The plaintiff's motion, therefore, must be denied.

IV

For the above reasons, the plaintiff's Motion for Leave to File its First Amended Complaint (ECF No. 31) is GRANTED IN PART AND DENIED IN PART. It is GRANTED with respect to Counts One, Two, Three, Four and Six, but is DENIED with respect to Count Five. The plaintiff's Motion for Certification and Leave to Appeal (ECF No. 32) is DENIED.

A First Amended Complaint may be filed in accord herewith, provided it is filed within 7 days of the date of entry hereof.

It is so **ORDERED**.

ENTER: March 21, 2013

/s/ James P. Jones
United States District Judge